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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE THE APPLICATION OF FRONTLINE SHIPPING LIMITED, REQUEST FOR DISCOVERY PURSUANT TO 28 U.S.C. § 1782.	Civil Action No. 17-Misc. _____

MEMORANDUM OF LAW IN SUPPORT OF AN
***EX PARTE* APPLICATION FOR DISCOVERY PURSUANT TO 28 U.S.C. § 1782**

Applicant, Frontline Shipping Limited ("Frontline"), an entity organized under the laws of Bermuda, by and through its undersigned counsel, Holland & Knight LLP, and for its memorandum of law (this "Memorandum") in support of its *Ex Parte* Application for Discovery Pursuant to 28 U.S.C. § 1782 (the "1782 Application"), states as follows:

I. PRELIMINARY STATEMENT

This Memorandum is offered in support of Frontline's 1782 Application seeking discovery with respect to documents located in the United States and in this Judicial District for use in the following foreign proceeding(s):

(i) Recognition and enforcement proceedings in the United Kingdom or any other jurisdiction in which Emirates Trading Agency LLC assets may be located of the London arbitration award dated July 23, 2014 in favor of Frontline and against Emirates Trading Agency LLC (the "London Arbitration Award"); and

(ii) Attachment and garnishment proceedings in the United Arab Emirates or any other jurisdiction in which Emirates Trading Agency LLC assets may be located.

While there are multiple entities and individuals involved in the interrelated Foreign Proceedings, this dispute is really between Frontline and Emirates Trading Agency LLC a/k/a ETA Dubai ("ETA"), and ETA's refusal to satisfy the London Arbitration Award. Through Frontline's continued pursuit of ETA, it has discovered that ETA appears to be actively evading enforcement of the London Arbitration Award. Based on Frontline's prior business relationship with ETA, Frontline is aware that ETA transacted business in U.S. Dollars (including having bank accounts in U.S. Dollars). Accordingly, Frontline should be able to locate ETA's financial trail through discovery of its U.S. Dollar financial activities (including but not limited to potential sources of bank accounts as well as business counterparties). This U.S. Dollar information will be critical is seeking to enforce the London Arbitration Award against ETA by revealing to Frontline data regarding the whereabouts of ETA's assets (or, for example, whether ETA has fraudulently conveyed its assets to a third party in order to make itself judgment-proof). Based on public corporate records filed in Dubai and as a result of the proceedings commenced by Frontline listed above, Frontline has discovered that there are Related Parties (as defined below) to ETA which may be fraudulent transferees, successors in interest and/or alter egos of ETA, based primarily on shared management structure of the Related Parties and representations made by the Related Parties.

Accordingly, Frontline intends to use the requested discovery to investigate, locate, and ultimately bring post-judgment recognition and enforcement proceedings (either in the existing Foreign Proceedings or elsewhere, as need be) to satisfy the London Arbitration Award against either the assets of ETA inside or outside of the United Kingdom or in relation to the following entities that ETA believes owe a debt to ETA, or are believed to be "substantially connected," a fraudulent transferee of, a successor in interest to, or an alter ego of ETA (the "Related Parties"):

i. E.A.S.T. International Limited;

ii. ETA Ascon Group;

iii. ETA Ascon Star Group;

iv. ETA Ship Management Co. India Ltd.;

v. West Asia Maritime Ltd.;

vi. Emirates Ports Services LLC;

vii. Associated Construction & Investments LLC;

viii. Star Maritime Pte. Ltd.;

ix. National Shipping Company;

x. Western Shipping and Trading Ltd.;

xi. Busan International Pvt. Ltd.;

xii. Saudi ETA;

xiii. United Shippers Limited;

xiv. USL Shipping DMCEST; and

xv. Pioneer Ship Management.

Under the circumstances, the following categories of evidence will be relevant, important and useful to Frontline's claims in the Foreign Proceedings, all of which evidence (principally expected to be documents) is located in the United States:

i. locating ETA's bank accounts;

ii. locating ETA's assets;

iii. locating ETA's counterparties;

iv. locating ETA's trading partners;

iv. identifying whether ETA has conveyed its assets to one or more of the Related Parties during the pendency of the Foreign Proceedings;

vi. identifying whether one or more of the Related Parties have succeeded ETA in dealing with ETA's counterparties and/or trading partners;

vii. identifying whether one or more of the Related Parties have received ETA's assets under circumstances which suggest that ETA has been controlled and/or dominated by one or more of the Related parties;

viii. locating the Related Parties' bank accounts;

ix. locating the Related Parties' assets;

x. locating the Related Parties' counterparties; and

xi. locating the Related Parties' trading partners.

Pursuant to 28 U.S.C. § 1782, an applicant may be granted discovery in the United States in aid of a reasonably contemplated foreign proceeding if: (i) the applicant is an interested party to the contemplated proceeding; (ii) the individual or entity from which information is sought resides or is found within the judicial district in which the applicant's application has been brought; and (iii) the information is located in the United States. As discussed below, Frontline's Application seeking discovery in aid of the Foreign Proceedings satisfies all of the requirements of Section 1782 and the Supreme Court's discretionary factors. Furthermore, it respectfully submitted that the facts of this matter demonstrate that discovery concerning ETA's U.S. Dollar activities is both relevant and crucial to Frontline in connection with the Foreign Proceedings and enforcement of the London Arbitration Award.

II. JURISDICTION AND VENUE

Jurisdiction is proper pursuant to 28 U.S.C. § 1782 as this Application is for discovery involving documents located within the Southern District of New York. The discovery is necessary to assist Frontline in recognizing and enforcing its London Arbitration Award including prosecuting the Foreign Proceedings. At all times material herein, Frontline is and was a foreign business entity organized under the laws of a foreign state (Bermuda). Venue in the Southern District of New York is appropriate pursuant to 28 U.S.C. § 1782 because the discovery is being sought from corporations within this judicial district, along with the documents presently located in this jurisdiction.

III. FACTUAL BACKGROUND

The facts giving rise to this Application are set forth in detail in the Declaration of Christopher M. Walker, dated May 19, 2017 (the "Walker Declaration" or "Walker Decl."), and the exhibits thereto, and in the Declaration of Michael J. Frevola dated May 24, 2017 (the

"Frevola Declaration" or "Frevola Decl."). For the sake of clarity, a brief background of the London Arbitration and the Foreign Proceedings is provided here.

On May 2, 2007, Frontline as disponent owner of the vessel *M/V FRONT CLIMBER* (the "Vessel"), and E.A.S.T. International Limited ("EAST"), as charterer, entered into a five year time charter party (the "Charter Party"). (Walker Decl. ¶ 4.) Emirates Trading Agency LLC a/k/a ETA Dubai ("ETA") countersigned that Charter Party, thereby guaranteeing the performance of its affiliate EAST. (*Id.* ¶ 5, Ex. 2.) In September 2009 EAST was placed in compulsory liquidation. (*Id.* ¶ 6.) Notwithstanding liquidation proceedings, performance under the Charter Party continued until hire payments by EAST (and ETA) ceased on March 18, 2011. (*Id.* ¶ 7.)

Frontline initiated arbitration in London in accordance with the rules of the London Maritime Arbitration Association against EAST and ETA. (*Id.* ¶ 8.) As EAST was in compulsory liquidation, Frontline pursued the arbitration solely against ETA. (*Id.* ¶ 9.) The London arbitration tribunal issued the London Arbitration Award on or about July 23, 2014. (*Id.* ¶ 11, Ex. 3.) The London Arbitration Award awarded Frontline US$12,206,603.05, plus interest approximately US$18,000 in costs (awarded in Pounds sterling) against ETA. (*Id.*)

Relying on the London Arbitration Award, Frontline has initiated or will initiate Foreign Proceedings in the U.K. and Dubai, seeking to have ETA satisfy the London Arbitration Award. (*Id.* ¶ 14). Despite their obligation to do so, ETA has never satisfied the London Arbitration Award. (*Id.* ¶ 15.) Instead, it appears ETA has sold assets, made efforts to shield true beneficial owners, and otherwise continues to evade judgment. (*Id.*)

IV. ARGUMENT

A. 28 U.S.C. § 1782 PROVIDES FOR DISCOVERY IN AID OF REASONABLY CONTEMPLATED FOREIGN ACTIONS

The basis for this *ex parte* Application is 28 U.S.C. § 1782 ("Section 1782"). "First, it is neither uncommon nor improper for district courts to grant applications made pursuant to § 1782 *ex parte*." *Gushlak v. Gushlak*, 486 Fed. Appx. 215, 217 (2d Cir. 2012).

Section 1782 authorizes a United States District Court, upon the application of an interested person, to order a person residing in the district to give testimony or produce documents for use in a foreign proceeding:

> The District Court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusations. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.

28 U.S.C. § 1782(a). Whether to grant this Application for discovery pursuant to 28 U.S.C. § 1782 is within this Court's discretion. *In re Application of Aldunate*, 3 F.3d 54, 62 (2d Cir.), *cert. denied*, 510 U.S. 965 (1993).

B. FRONTLINE SATISFIES THE STATUTORY REQUIREMENTS OF SECTION 1782

The United States Supreme Court has interpreted Section 1782 as having a broad application. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 259 (2004). In determining that Section 1782 authorizes a federal district court to provide discovery assistance, the Supreme Court specifically rejected the multiple limitations that Intel attempted to inject into the interpretation of the statute. *Intel*, 542 U.S. at 256. Instead, the Supreme Court adopted a broad and liberal interpretation of the Statute and provided guidelines for the future application of the statute by federal district courts. *Id.*

Frontline satisfies each of the requirements of Section 1782 and those set forth by the Second Circuit in *Aldunate*. *Id.* In *Aldunate*, the Second Circuit stated of Section 1782 that:

> [T]he statutory language is unambiguous in its requirements: (1) the person from whom discovery is sought must reside in or be found in the district of the district court to which the application is made, (2) the discovery must be "for use in a proceeding in a foreign or international tribunal," and (3) the application must be made "by a foreign or international tribunal" or by "any interested person."

3 F.3d at 58 (quoting 28 U.S.C. § 1782).

Thus, the Court may enter an order allowing discovery for use in the Foreign Proceedings, as well as any other recognition and enforcement action which Frontline might commence as a result of the information obtained. Specifically, Frontline is an interested person to the Foreign Proceedings; the persons or entities with possession, custody and/or control of the discovery sought reside in or are found within this District; and the evidence is sought for use in the Foreign Proceedings, which are or will be held before a foreign tribunal.

1. Frontline, the Applicant, Is an Interested Person to the Foreign Proceedings

Frontline is the petitioner and claimant in the Foreign Proceedings, including the London recognition and enforcement proceedings and the actions in the UAE.. As Frontline is, or will be, a party to all and any Foreign Proceedings, it is clearly an "interested person" as that term is used in 28 U.S.C. § 1782. *See In re Application of Malev Hungarian Airlines*, 964 F.2d 97, 101 (2d Cir.), *cert. denied*, 506 U.S. 861 (1992). Corporations and business entities qualify as a "person" under Section 1782, as the United States Code defines a "person" to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1.

The Court's decision in *Intel* highlights the broad applicability of this standard. The Supreme Court recognized the definition of an interested party to be any person who "possess[es] a reasonable interest in obtaining [judicial] assistance." *Intel*, 542 U.S. at 256. Here, Frontline is actively pursuing numerous Foreign Proceedings arising out of this dispute. Frontline possesses a reasonable interest in obtaining the assistance requested.

2. *The Persons or Entities with Possession, Custody and/or Control of the Discovery Sought Reside in or Are Found Within this District*

In addition, the New York banks from which discovery is sought "reside" or are "found" in this Judicial District. A company is found where it is incorporated, headquartered, or where it is engaged in "systematic and continuous activities." *In re Godfrey*, 526 F. Supp. 2d 417, 422 (S.D.N.Y. 2007) (citation omitted). Frontline seeks the production of documents by Bank of America N.A.; Bank of China; The Bank of NY Mellon; Barclays Bank PLC; BNP Paribas SA; Citibank, N.A.; Commerzbank AG; Deutsche Bank AG; HSBC Bank (USA) NA; JPMorgan Chase Bank N.A.; Societe Generale; Standard Chartered Bank; UBS AG; and Wells Fargo Bank, N.A. (hereinafter collectively referred to as "New York Banks").

Each of the New York Banks have an office in the District and maintains the records requested. (Frevola Decl., ¶ 2.) Moreover, the New York Banks have responded to past subpoenas which sought similar records, without objection, as early as two weeks after receipt of the subpoena. (*Id.* ¶ 3.) Frontline anticipates serving the New York Banks with subpoenas in this District upon the issuance of an order by the Court authorizing the discovery assistance requested.

3. *Discovery Is Sought for use in the Foreign Proceedings, Which Are or Will Be Held Before One or More Foreign Tribunal*

Frontline seeks discovery "for use in a proceeding in a foreign or international tribunal." *Aldunate*, 3 F.3d at 58 (quoting 28 U.S.C. § 1782). As the Supreme Court in *Intel* explained, "the 'proceeding for which discovery is sought under § 1782(a) must be within reasonable contemplation, but need not be 'pending' or 'imminent.' ' " 542 U.S. at 243 (citation omitted). As set forth in the Walker Declaration, Frontline has initiated or will initiate several actions in the U.K., the U.A.E., and other jurisdictions after obtaining sufficient discovery from the New York Banks.

In *Intel*, the Supreme Court confirmed a low threshold for satisfying the "foreign or international tribunal" requirement by concluding that the Directorate General (i.e., a governmental investigative body and not a court) is a "tribunal" for the purposes of satisfying the requirements of Section 1782. The Court also stated that "[t]he term 'tribunal' . . . includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts." *Intel*, 542 U.S. at 248. In light of the expansive definition of the term "tribunal," there is no question that the Foreign Proceedings initiated and contemplated qualify as "proceeding[s] in [ ] foreign or international tribunal[s]."

The *Intel* Court relied on the legislative history of the statute to hold that a foreign proceeding need not be pending in order for Section 1782 to provide judicial assistance. *Id.* at 258. In fact, the Court expressly rejected the previous view held by the Second Circuit that a proceeding must be "imminent – very likely to occur and very soon to occur." *Id.* at 259 (rejecting *In re Ishihara Chemical Co.*, 251 F.3d 120, 125 (2d Cir. 2001)). Rather, the Court held that the proceeding must only be within "reasonable contemplation." *Id.*

Since *Intel*, several District Courts have followed the Supreme Court's ruling that 28 U.S.C. § 1782(a) allows for discovery assistance to proceedings which have not yet been filed. *See e.g., In re Wilhelm*, 470 F. Supp. 2d 409, 410-11 (S.D.N.Y. 2007); *In re Marano*, No. 09-80020, 2009 WL 482649, *2 (N.D. Cal. Feb. 25, 2009) (in the civil proceeding context). Frontline has demonstrated that numerous actions are not only within reasonable contemplation but have already been commenced.

4. *No Other Factors Weigh Against Allowing Discovery*

In addition to satisfying the requirements of *Aldunate*, 3 F.3d at 58, there are no factors which would argue against allowing the discovery. In *Malev*, the Second Circuit emphasized that the goals of Section 1782 should be considered in deciding motions brought under the statute. *Malev*, 964 F.2d at 100. These goals of Section 1782 are:

> [T]win aims of providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign courts by example to provide similar means of assistance to our courts.

Id. Both these aims will be fulfilled by granting the requested discovery. The discovery sought will assist Frontline in the Foreign Proceedings. More specifically, the discovery sought will enable Frontline to enforce the London Arbitration Award. Thus, the goals of the statute will be accomplished through granting this Application. Given the holdings in *Aldunate* and *Malev*, it must be concluded that a Section 1782 application should be granted where, as here, an applicant has met the express requirements of the statute and where the discovery will achieve the goals set by the statute's enactment. *Aldunate*, 3 F.3d at 58; *Malev*, 964 F.2d at 100.

C. *FRONTLINE ALSO SATISFIES INTEL'S DISCRETIONARY FACTORS*

In *Intel*, the Court identified four factors that bear consideration in ruling on a Section 1782 request. While the factors are not exhaustive, the Court stated that a court ruling on a

Section 1782 request should consider: 1) whether the person from whom discovery is sought is a participant in the foreign proceeding; 2) the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government, court, or agency to federal-court judicial assistance; 3) whether the Section 1782(a) request conceals an attempt to circumvent foreign proof-gathering limits or other policies of a foreign country or the United States; 4) whether the discovery requests are unduly intrusive or burdensome. *Intel*, 542 U.S. at 264-65.

Granting Frontline's request for relief is consistent with the guidance provided by the *Intel* court as none of the New York Banks will be parties to or participants in the Foreign Proceedings. As such, Frontline would be unable to obtain discovery from the New York Banks in the Foreign Proceedings in the U.K., the U.A.E., or other jurisdictions.

The nature of the Foreign Proceedings does not implicate any factor or policy that would weigh against granting Frontline's request. Instead, the nature of the Foreign Proceedings – arbitral awards and judgment enforcement proceedings – weighs in favor of Frontline's request.

Furthermore, as the information sought would be used in commencing targeted enforcement actions rather than a discovery in the pre-trial phase of a dispute on the merits, it is respectfully submitted that granting the assistance requested by Frontline would not offend any foreign jurisdiction or constitute a circumvention of foreign proof-gathering rules.

Finally, the requests are neither unduly intrusive nor burdensome. As discussed above, the key information relevant to the Foreign Proceedings is located in this District. This includes documentation from the New York Banks. As noted above, this information is not available to Frontline.

D. THE COURT SHOULD EXERCISE ITS DISCRETION TO GRANT FOREIGN DISCOVERY ASSISTANCE

Under the circumstances, evidence that will be relevant to Frontline's claims in the Foreign Proceedings is not available abroad, but is located in the United States and/or in this District (in terms of both documents and witnesses). As such, Frontline respectfully requests the Court grant its request for discovery pursuant to 28 U.S.C. § 1782 to obtain discovery (as is specified in the Application) concerning:

i. ETA's bank accounts;

ii. ETA's assets;

iii. ETA's counterparties;

iv. ETA's trading partners;

v. whether ETA has conveyed its assets to one or more of the Related Parties during the pendency of the Foreign Proceedings;

vi. whether one or more of the Related Parties have succeeded ETA in dealing with ETA's counterparties and/or trading partners;

vii. whether one or more of the Related Parties have received ETA's assets under circumstances which suggest that ETA has been controlled and/or dominated by one or more of the Related parties;

viii. the Related Parties' bank accounts;

ix. the Related Parties' assets;

x. the Related Parties' counterparties; and

xi. the Related Parties' trading partners.

Obtaining this information will require subpoenas requiring production of U.S. Dollar wire transfer activity of ETA and the Related Parties, all of which are located in the United States as well as the New York Banks.

V. CONCLUSION

In summary, consistent with precedent cited above, the facts in the present matter clearly meet the requirements of 28 U.S.C. § 1782, and this Application for the Order should be granted.

Dated: New York, New York
May 24, 2017

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By: ______________________

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